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No. 98-126

FILED
NOV 3 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,

Petitioner,

vs.

JANE DOE,

Respondent,

and

THE UNITED STATES,

Intervenor-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner The Board of Trustees of the University of Illinois (the "University") submits this Reply to the Brief for the United States and the Brief for Respondent Jane Doe ("Doe") in response to the University's Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review four (4) questions presented by the Seventh Circuit decision herein, reported at *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir. 1998), *petition for cert. filed*, 67 USLW 3083 (July 13, 1998) (No. 98-126).

DISCUSSION

The University seeks review of four (4) questions presented:

(1) Whether a cause of action under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX") can be maintained against educational institutions receiving federal funds for student peer sex harassment without pleading and proving an intent to discriminate on the basis of sex by the institution;

(2) If so, whether the applicable standard of liability is deliberate indifference, pursuant to *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S.Ct. 1989 (1998);

(3) Whether Congress abrogated the States' Eleventh Amendment immunity from suit under Title IX pursuant to a valid (*albeit* unstated) exercise of power under Section 5 of the Fourteenth Amendment, as required by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); and

(4) Whether the recognition of a cause of action which does not require proof of sexually discriminatory intent by a State institution exceeds the substantive guarantees of the Fourteenth Amendment pursuant to *City of Boerne v. Flores*, 521 U.S. 507 (1997) and, therefore, could not be a valid abrogation of the Eleventh Amendment sovereign immunity of the States from such a suit.

Subsequent to the filing of the petition herein, the Supreme Court granted certiorari in *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*), *cert. granted*, 66 USLW 3387 (September 29, 1998) (No. 97-843), to review whether Title IX, which prohibits sex discrimination in federally funded education programs and activities, encompasses a cause of action for student peer hostile environment sexual harassment.

In response to the University's petition herein, the United States maintains that the petition should be held pending the Court's decision in *Davis* and disposed of in accordance with that decision, or alternatively denied. In all other respects, the United States submits that the petition should be denied. Doe responded to this petition prior to the Supreme Court's grant of certiorari in *Davis*, and maintains that the petition should be denied.

The University states in reply that the petition should be granted, in whole or in part, and consolidated for review with *Davis* or, alternatively, that the petition should be held pending the Court's decision in *Davis* and disposed of in accordance with that decision. The University submits that the petition should *not* be denied in any respect at this time.

The first question presented by the University regarding whether a cause of action exists under Title IX against educational institutions receiving federal funds for student peer sex harassment will be addressed by the Court in *Davis*, unless that case is settled by the parties thereto. Indeed, contrary to Doe's brief, the Seventh Circuit's recognition of a cause of action for student peer sex harassment herein created a conflict with the decision of the Eleventh Circuit in *Davis*, as well as with the Fifth Circuit in *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S.Ct. 165 (1996). Because of the similar issues presented and the opposite conclusions reached by the Seventh and Eleventh Circuits on the question presented in *Davis*, the University maintains that the Court should grant the University's petition and consolidate *Doe* with *Davis* at least as to the first question presented, or hold the petition pending the Court's decision in *Davis* and dispose of this petition in accordance with that decision. *See Lehman Bros. v. Schein*, 416 U.S. 386, 387 (1974) (petitions for certiorari in three cases which raised the identical question were granted and consolidated for oral argument).

The Court should *not* deny the petition at this time. The Court in *Davis* will decide whether a cause of action exists for student peer sex harassment against institutions under Title IX. *Davis* held that such a cause of action does not exist; *Doe* held that such a cause of action does exist. A denial of the petition herein and remand for further proceedings at this time would not be in the interest of justice. In the event the Court affirms the Eleventh Circuit's opinion in *Davis*, the Court would necessarily reverse the Seventh Circuit's decision herein in *Doe* and

no further proceedings in this case would be necessary. Therefore, the University respectfully requests the Court not to deny the petition at this time and, at a minimum, to hold it pending the Court's decision in *Davis*.

Contrary to the United States' brief, the fact that the initial question presented herein is raised at the pleading stage does not diminish the appropriateness of the Court's review of the question. Indeed, the *Davis* case is also a case decided on a motion to dismiss. It would not be an efficient use of the judicial system or the resources of the parties to have the *Doe* matter proceed while this Court is determining in *Davis* the fundamental question of whether there is such a cause of action.

The University also submits that the Court should either grant the University's petition on the three other issues presented, or hold the petition pending the Court's decision in *Davis* and dispose of these issues once a decision in *Davis* has been made. In the event the Court determines in *Davis* that there is no cause of action under Title IX against educational institutions for student peer sex harassment, the remaining issues presented in this petition will be moot. However, in the event the Court recognizes a cause of action for student peer sex harassment in *Davis* against the Monroe County Board of Education, the Court should consider the remaining issues presented in the University's petition herein: the appropriate standard (*i.e.*, deliberate indifference), and the availability of such a cause of action against State entities such as the University in light of the Eleventh Amendment sovereign immunity issues presented.

Contrary to the United States' and Doe's briefs, the Seventh Circuit decision in *Doe* is *not* consistent with the Court's recent decision in *Gebser*, wherein the Court held that the proper standard of liability applicable to institutional liability for teacher/student sex harassment claims under Title IX was deliberate indifference. To the contrary, the Seventh Circuit recognized a hybrid standard of liability, requiring actual knowledge by responsible officials and "failure to take prompt, appropriate" responsive action. *Doe*, 138 F.3d at 661 (A. at 18). The University respectfully submits that the Court would not apply a lesser standard of Title IX liability to institutional responses to student peer sex harassment then applied to teacher/student sex harassment. Therefore, at a minimum, if a cause of action for student peer sex harassment is recognized by the Court in *Davis*, the Court should remand this case to the Seventh Circuit for further proceedings consistent with *Davis* and *Gebser*.

Contrary to the United States' and Doe's briefs, this case is *not* a poor vehicle for the Court's review of the University's *City of Boerne* argument that the recognition of a cause of action against State educational institutions for failing to take prompt and appropriate action in response to student peer sex harassment without a showing of an intent to discriminate on the basis of sex by the institution would exceed the substantive protections of the Fourteenth Amendment and, accordingly, could not be a proper abrogation of the States' Eleventh Amendment immunity from such suits. The Court will address whether there is a cause of action against educational institutions for student peer sex harassment in *Davis*.

However, *Davis* does not involve a State educational institution and does not present the Eleventh Amendment issues which are implicated by the recognition of such a cause of action against State educational institutions. Due to the numerous State institutions of education, a complete review of the availability of a Title IX cause of action for student peer sex harassment necessarily involves a determination of the Eleventh Amendment issues presented herein. The Eleventh Amendment issues are legal issues, which are not factually based. Therefore, notwithstanding that the *City of Boerne* issues were presented for the first time in the petition for rehearing with suggestion for rehearing *en banc*, the Court can fully review the Eleventh Amendment questions of law presented. *See Parratt v. Taylor*, 451 U.S. 527, 556 n.2 (1981) (dissent) (issue addressed by Court was first presented in petition for rehearing); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 579 (1980) (issue addressed by Court was raised for first time in a footnote in petition for rehearing).

CONCLUSION

The University requests the Court to grant the University's petition, in whole or in part, and consolidate the issues presented with *Davis*. At a minimum, the Court should hold the University's petition pending the Court's decision in *Davis*, and dispose of the petition in accordance with the Court's decision in *Davis*, as well as in

Gebser, if necessary. The Court should *not* deny the petition at this time.

Respectfully submitted,

The Board of Trustees of the University of Illinois

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